In the Supreme Court of the United States

OCTOBER TERM, 1963

No. 785

GERSON NAGELBERG, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE UNITED STATES

OPINION BELOW

The opinion of the court of appeals (Pet. App. 11) is reported at 323 F. 2d 936.

JURISDICTION

The judgment of the court of appeals was entered on October 24, 1963 (Pet. App. 12). A petition for rehearing was denied on November 27, 1963 (Pet. App. 13, 14). An order by Mr. Justice Harlan dated December 13, 1963 extended the time for filing a petition for a writ of certiorari to and including January 25, 1964. The petition was filed on January 24, 1964. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

726-001—64

QUESTION PRESENTED

Whether the trial court, prior to sentencing, properly refused to allow petitioner to withdraw his plea of guilty, notwithstanding the government's acquiescence, where the motion was predicated solely on petitioner's subsequent cooperation with the government in its efforts to uncover other violations of law.

RULE INVOLVED

Rule 32(d) of the Federal Rules of Criminal Procedure provides:

> (d) *Withdrawal of Plea of Guilty.* A motion to withdraw a plea of guilty or of *nolo contendere* may be made only before sentence is imposed or imposition of sentence is suspended; but to correct manifest injustice the court after sentence may set aside the judgment of conviction and permit the defendant to withdraw his plea.

STATEMENT

Petitioner was charged in a three-count indictment returned in the United States District Court for the Southern District of New York, the first two counts charging unlawful sales of narcotics and the third conspiracy to violate the narcotics laws (R. 6–8). On April 11, 1962, petitioner pleaded not guilty to all three counts (R. 2, 9). On July 18, 1962, petitioner, with counsel present, moved to withdraw his plea of not guilty and pleaded guilty to the three counts (R. 3, 10–11). This colloquy took place (R. 10):

> The COURT. * * * Are you pleading guilty to counts 1, 2 and 3?
>
> Mr. SANDERS [petitioner's counsel]. Yes, Your Honor.
>
> The COURT. Is that your understanding, Mr. Nagelberg?
>
> The DEFENDANT. Yes.
>
> The COURT. In other words, you want to plead guilty to two crimes of possessing and selling heroin, one on the 15th of June 1960 and the other on the 17th of August, 1960 and the third count of conspiring with John Batson to violate the Federal Narcotic laws, is that true?
>
> The DEFENDANT. Yes.

The court asked if the petitioner knew that the court was required by Congress to impose a minimum sentence of five years on each of those crimes, and the petitioner answered in the affirmative. When assured by petitioner that no promises had been made to him by his attorney, the government attorney, or by anyone else, the court accepted the plea (R. 11).

In November 1962, when petitioner's case came before the court for sentencing, petitioner's counsel moved to withdraw the guilty plea, saying (R. 12):

> I understand, if the Court pleases, that there was a thorough interrogation of the defendant at the time that he took this plea, but there are certain factors and facts that have arisen since the time of the plea, and I think in the interests of justice, if the Court pleases, that this plea should be withdrawn at this time.

Government counsel stated he did not object to petitioner's application (R. 13). Counsel referred to petitioner's cooperation with the government and the court indicated that the probation report reflected the fact (R. 13). When counsel said the probation report did not reveal the full extent of cooperation, the court said (R. 14):

> I would assume the man has helped you more than anybody in history. I still say that that is not a ground for giving him permission to withdraw his plea.

The court noted that Congress had taken away its power to exercise clemency (R. 14). It denied the motion on the ground that cooperation was not a ground for granting a motion to withdraw the plea (R. 14–15).

Sentencing was adjourned and the matter came before the court again on March 18, 1963. Petitioner's counsel renewed his motion to withdraw petitioner's plea of guilty on the basis of petitioner's cooperation with the government and the government attorney consented to the motion (R. 17). In denying the motion the district court stated: "I have no power to withdraw or permit the withdrawal of a plea on the grounds advanced, whether the government consents or does not consent" (R. 17).

The court sentenced petitioner to the minimum term of five years (R. 19, 21–22).

DISCUSSION

The only ground assigned for withdrawal of the plea was petitioner's cooperation with the govern-

ment after he entered his plea of guilty. The record does not support petitioner's contention that he was prevented from presenting to the district court other grounds for withdrawal of his plea. Although the court, after stating that the motion was denied, refused permission for counsel to approach the bench and insisted on argument in open court (R. 13), petitioner's counsel was in no way limited in his presentation of reasons supporting his motion. The only ground advanced was petitioner's cooperation (R. 14–15, 17). Petitioner did not deny that his plea had been knowingly entered and had not been induced by promises; he did not deny commission of the offenses or claim any defense to the charges. Nor was any other reason given why a guilty plea should not have been entered. Cf. *United States* v. *Fox*, 130 F. 2d 56, 59 (C.A. 3), certiorari denied, 317 U.S. 666; *United States* v. *Moore*, 290 F. 2d 501 (C.A. 2), certiorari denied, 368 U.S. 837. Petitioner's motion, standing alone, thus presented no basis on which the court could exercise its discretion to permit withdrawal of the plea.[1] It could only serve as an appeal

[1] Petitioner argues that since his motion for withdrawal of the guilty plea was made prior to, instead of after, sentence as in *United States* v. *Norstrand Corp.*, 168 F. 2d 481 (C.A. 2), the court of appeals improperly relied upon that case to impose upon petitioner a stricter standard of showing "manifest injustice" under the second clause of Rule 32(d) instead of under the more lenient standard in the first clause of the rule (Pet. 4–6). The court below, however, cited *Norstrand* only in the context of petitioner's failure to deny his guilt or to assert that his plea was improperly induced or extracted (Pet. App. 11)—factors which are relevant whether the withdrawal motion is made before or after sentence.

for leniency, to which the court responded by imposing the minimum penalty on each of the three charges and by providing that the sentences should run concurrently.

The question arises, however, whether the government's acquiescence in petitioner's motion to withdraw his plea changes the situation. While the point is not urged in this Court, petitioner argued in the court of appeals that the government's consent to the granting of the motion bound the court, and we think it proper to notice the contention.

We are clear that a court remains free to refuse permission to withdraw a plea of guilty despite the government's acquiescence. Thus, in the present circumstances, it may well be that denial of the motion would not have been an abuse of discretion. On the other hand, it seems to us that an explicit request by the government to vacate the plea so as to permit an exercise of prosecutorial discretion empowers the judge to act and requires him to exercise his judicial discretion. Cf. *Petite* v. *United States,* 361 U.S. 529; *Marakar* v. *United States,* 370 U.S. 723. The difficulty here is that the trial judge apparently thought himself wholly without power to act on the government's acquiescence (R. 12–18; Pet. 7–8). That was perhaps because of the equivocal procedural posture of the matter and because the prosecutor did not explain (on the record, at least) what course he intended to pursue if the motion were granted. Indeed, the government's bare consent to a defense request to withdraw a plea of guilty was wholly irrelevant unless it was the equivalent of a government motion to va-

cate an adjudication of guilt preliminary to a dismissal of the charges. While it seems to us that was the implication of the government's acquiescence, it is true the purpose was not expressly stated. Thus, it may be that the court was misled. But, in any event, it is important that the trial court be afforded an opportunity to exercise its discretion, as on a government motion to dismiss the indictment, with a full appreciation of the government's motives and intentions.

The fact is that, in recognition of his valuable cooperation in uncovering other offenders, the government planned to dismiss the pending indictment against petitioner and substitute lesser charges.[2] It was with a view to that end that the government consented to a withdrawal of the plea of guilty already entered. That was, on its face, a proper implementation of the governmental policy—both necessary and just—of treating with leniency those who have broken the law but now materially contribute to law enforcement, sometimes imperilling their own lives to make possible the apprehension of more dangerous criminals. To be sure, prosecutorial discretion in such cases is usually exercised before indictment, or at least before arraignment. Yet, the accident that valuable cooperation occurs only after a plea of guilty has already been entered does not

[2] The intention was to substitute for the present indictment charging violations of 21 U.S.C. 174 (which carries a minimum sentence of five years, without possibility of probation or parole) an indictment under 26 U.S.C. 4704(a) which carries a minimum of two years and permits of probation or parole. See 26 U.S.C. 7237(d).

change the policy considerations supporting some freedom of governmental action. Doubtless, when the matter has proceeded so far, the exercise of prosecutorial discretion is properly subject to judicial scrutiny. But the court should not peremptorily reject the government's considered decision. Nor, of course, is there any reason to delay action until a final judgment of conviction has been entered or sustained on appeal.'

We do not deem it appropriate to argue here whether, in the present circumstances, the trial judge should defer to the government's acquiescence. That would require going far beyond the record. Moreover, it is, in the first instance, a question for the district court. Our submission is that the cause should be remanded to the district court so as to permit the trial judge to make an informed judgment after the government has made a full disclosure of its intentions and of its reasons. Accordingly, the United States does not oppose the granting of the petition for certiorari and the entry of an order vacating the judgment of the court of appeals and remanding the case to the district court to enable it to consider in appropriate proceedings whether it should not vacate its own judgment, permit the with-

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'Of course, the government might have awaited sentencing and presented its own motion to vacate the judgment in the trial court, or later, even in this Court. Cf. *Petite* v. *United States*, *supra*. But it seemed preferable to join in the defendant's motion to withdraw his plea, rather than consent to the entry of judgment which it would then ask to have set aside.

drawal of the plea of guilty and grant leave to dismiss the indictment.

Respectfully submitted.

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